89-1173

No. 89-_____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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PAUL LUSKIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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MICHAEL S. LIEBERMAN
*Counsel of Record*
DIMURO, GINSBERG AND LIEBERMAN, P.C.
1001 Duke Street
Alexandria Virginia 22314
(703) 684-4333

BENJAMIN F.L. DARDEN, ESQUIRE
LAW OFFICES OF MORRIE I. LEVINE
Suite 316
780 N.E. 69th Street
Miami, Florida 33138
(305) 758-4703

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

## QUESTION PRESENTED

1. Whether the innocent and innocuous independent evidence presented, in combination with the co-conspirator's statements, was sufficient evidence for the Court to conclude that the petitioner and his co-defendants were co-conspirators, and that, as such, certain statements made by one co-conspirator repeating what another co-conspirator had said he heard about petitioner's involvement in the conspiracy, were properly admitted under Rule 801 (d)(2)(E), Federal Rules of Evidence.

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### OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a-15a, *infra*) is not officially reported. Slip Op. No. 88-5068 (4th Cir. Sept. 19, 1989). No opinion was delivered in the District Court in entering the judgment reviewed by the Court of Appeals.

### JURISDICTION

The original judgment of the Court of Appeals was entered on September 19, 1989. On October 19, 1989 the Court of Appeals denied a timely petition for rehearing (App. 2a, *infra*). On December 11, 1989, Chief Justice

Rehnquist, as Circuit Justice to the United States Court of Appeals for the Fourth Circuit, entered an Order granting petitioner's Application To Extend Time for Applying For A Writ of Certiorari, extending the time to and including January 17, 1990. (App. 1a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Federal Rule of Evidence 801(d)(2)(E):

> (d) Statements which are not hearsay,—A Statement is not hearsay if—
>
> . . .
>
> (2) Admission by party-opponent.—The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

## STATEMENT

Petitioner Paul Luskin was named in a twelve count indictment charging conspiracy to commit murder and various related charges. Indicted with Mr. Luskin as participants in a conspiracy to murder Luskin's wife, were James Liberto, Joseph Liberto and Milton "Sonny" Cohen. Luskin, and his co-defendants James Liberto, Joseph Liberto and Milton "Sonny" Cohen, were charged with the following offenses: conspiracy (18 U.S.C. § 371); three counts of using the facilities of interstate commerce in the commission of murder for hire (18 U.S.C. § 1952 A); three counts of carrying a firearm during a crime of violence (18 U.S.C. § 924 (c)); and one count of possession of an unregistered firearm (26 U.S.C. §§ 5845 (a)(7), 5861(d), 5871). Cohen and James Liberto where also charged with

illegal possession of a firearm by a convicted felon (18 U.S.C. §§ 922 (g)(1), 924(a)(1)(B)). After a four-week trial, the jury found all defendants guilty on all counts.

The evidence at the trial showed that on July 30, 1987, Sonny Cohen and James Manley were arrested at the train station in Baltimore, Maryland after a search warrant for their luggage was executed and revealed a large quantity of cocaine, two loaded pistols, and a loaded A.R.15 rifle. Sometime thereafter, Manley approached the authorities and entered into a plea agreement.[1] Manley's subsequent testimony then became the linchpin of the government's case.

Manley testified that in May, 1987, while in Baltimore, his long-time friend, Sonny Cohen asked him to travel to Florida in order to assist in the completion of a murder of a woman residing there. According to Manley, he agreed to assist Cohen, and a week later he left for Miami with Cohen by car. Manley testified that during this trip Cohen told Manley that the person they would kill was Marie Luskin, and that earlier, in March, Cohen had travelled to Florida, gained entry to the Luskin residence by posing as a florist, and shot Mrs. Luskin, but she survived. Manley also claimed that Cohen told him that he had been hired to commit the murder by James Liberto, who also lived in Baltimore. Manley testified that Cohen told him that James Liberto had been contacted about the murder by his brother, Joseph Liberto, who lived in Florida and was an employee at a store owned by Paul Luskin's family. Manley claimed that Cohen also said that Joseph Liberto

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[1] In exchange for his testimony, the United States agreed to dismiss six of the seven counts in an indictment then pending against him, and to recommend to state prosecutors that they dismiss the numerous state charges against Manley.

had been solicited by Paul Luskin to find someone to kill his wife. Neither Manley nor Cohen, (through his statements to Manley), ever claimed to have talked to Luskin directly about his participation, nor did Manley or Cohen, (through his statements to Manley), ever witness any direct involvement by Luskin in the conspiracy. Moreover, no evidence was adduced to show how, when, and under what circumstances Cohen allegedly came into possession of this knowledge that Luskin was involved in a conspiracy to murder his wife. The colloquy at trial between the Assistant United States Attorney and Manley was as follows:

> Q. And did he [Cohen] tell you who had hired Jimmy Liberto to commit this murder?
>
> A. Yes, sir, Paul Luskin.
>
> Q. And did he tell you where this information was to come from about this woman [Marie Luskin]?
>
> A. From Jimmy's brother Joseph, who lives in Florida and works for Mr. Luskin.
>
> Q. Now, Mr. Manley, did you ever meet Paul Luskin?
>
> A. No, Sir.
>
> Q. And did you ever meet Jimmy Liberto?
>
> A. No, Sir.

(Tr. 1577-1578). Later, Manley was asked: "And did he [Cohen] tell you who was providing the money ultimately to pay on this contract to murder Marie Luskin?", to which he answered, "Paul Luskin." (Tr. 1580-1581). He was also asked: "Did he tell you who was providing the information about Marie Luskin?", to which he answered: "Yes, sir, he said that Joe worked for Paul Luskin in

Florida and lived there and all information was transported by telephone from Joe Liberto to Jimmy Liberto." (Tr. 1581). Petitioner's objections to this testimony at trial were overruled, after the court found the testimony admissible as the statement of a co-conspirator.[2]

Manley also testified that during that trip to Florida in May, he and Cohen stalked Mrs. Luskin, but no attempt was made on her life. (Tr. 1603-18).

According to Manley, he and Cohen returned to Florida in late July, 1987, after learning Mrs. Luskin would be alone at Bennigan's Restaurant in Hollywood, Florida, on July 28. (Tr. 1629-30). Manley claimed that prior to their return to Florida, Cohen told Manley that there would be a $25,000 bonus if the job was completed on July 28, because of upcoming divorce proceedings. (Tr. 1629). The source of this information was not identified. Manley then testified that although he and Cohen went to Bennigan's on that date, no attempt was ultimately made on the life of Mrs. Luskin. (Tr. 1637-44). Finally, Manley testified that he and Cohen later left Florida by train, and were arrested upon their arrival in Baltimore.

While substantial additional evidence was introduced tending to establish a relationship between petitioner's various co-defendants,[3] and their contact with each other

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[2] This testimony was the only direct testimony linking Paul Luskin to a conspiracy to murder Marie Luskin. The remaining evidence adduced at trial was purely circumstantial, speculative and innocent behavior. It is the admission of this testimony under the co-conspirator statement rule that forms the basis for this Petition.

[3] At trial, Luskin agreed that his co-defendants were involved in a conspiracy, and continually sought to introduce to the jury evidence that his co-defendants were involved in a large-scale conspiracy to distribute drugs, which did not include Luskin.

through hotel records and telephone toll records, placing them together during critical periods of the conspiracy, virtually none of this evidence pertained to Paul Luskin. To the extent any of this evidence did relate to Luskin, it was all innocent and wholly innocuous conduct.

In allowing the government to present the statements of Cohen to Manley under the co-conspirator rule, the District Court merely overruled the objections of counsel, without any specific findings.

In affirming the trial court, the Court of Appeals found that "the Government introduced a plethora of evidence to show both that a conspiracy existed and that Paul Luskin was an active participant in it," and that much of this evidence was circumstantial. (App. 12a, *infra*). The two pieces of evidence cited by the Court of Appeals in support of this conclusion, however, do not support the court's holding.

The first of the two evidentiary facts relied upon by the Court of Appeals was that since Cohen knew that Marie Luskin would be at Bennigan's Restaurant on July 28, 1987, and since Paul Luskin was informed by his then-girlfriend that Marie Luskin would be at Bennigan's on that date, it was a reasonable inference that Cohen gained his information from Paul Luskin.

The second example of circumstantial evidence cited by the court, and the far more important one, was the court's finding that within an hour of the first attempt on Marie Luskin's life on March 9, 1987, a telephone call was forwarded from the Marco Polo Hotel, where Sonny Cohen was a registered guest, to Pellucci's Restaurant in Baltimore, which was owned and operated by Jimmy Liberto, and that five minutes later there was a call from

Pellucci's to Joe Liberto's home in Florida. The Court of Appeals then found that:

> one minute after that call ended, there was a call from Pellucci's to *Paul Luskin's home in Baltimore.* Shortly thereafter, Luskin placed a call from his car telephone to his home in Florida where his wife's aunt answered the phone. Although Marie Luskin had at this time already been shot, the aunt who answered the telephone did not so inform him. Luskin then immediately placed *a call to Pellucci's Restaurant.* (emphasis added).

(App. 12a-13a, *infra*). From this, the court found it to be a reasonable inference that Luskin was in fact involved in the conspiracy.

However, the Court of Appeals misapprehended the record.[4] There is nothing in the record to support the court's finding that on March 9, there was a call from Pellucci's to Paul Luskin's home in Baltimore, or that Paul Luskin later called Pellucci's.[5] Accordingly, without this erroneous understanding of the record, the entire telephone activities of March 9 cited by the court were irrelevant, as to Paul Luskin. The most important piece of circumstantial evidence relied upon by the Court of Appeals did not exist.

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[4] Additionally, the Court of Appeals opinion erroneously states in its statement of the facts that Jimmy Liberto was a business associate of Paul Luskin. (App.3a-6a, *infra*). There is no such evidence in the record.

[5] The record clearly shows that Paul Luskin had not resided in Baltimore since the early 1970's and therefore, no call from Pellucci's to Luskin's home in Baltimore was possible. The record is also clear that at trial, it was shown that Luskin was in Pittsburg, Pennsylvania on March 9, and not Baltimore, Maryland. Finally, there is no evidence in the record that Paul Luskin *ever* called Pellucci's.

## REASONS FOR GRANTING THE WRIT

If this case had been tried in any district court within the Ninth Circuit, the key, and perhaps only, evidence tending to show that Paul Luskin had conspired to murder his wife would have been inadmissible. See *United States* v. *Silverman*, 861 F.2d 571, 578 (9th Cir. 1988). The same is true had the State of Florida brought charges against him. See *Romani* v. *State*, 542 So.2d 984, 986 (Fla. 1989). In both jurisdictions, the jury would not have heard the damaging third-and fourth-level co-conspirator statements of Sonny Cohen that were introduced through Manley. This testimony by Manley, that Paul Luskin was involved in the conspiracy, was told to Manley by Sonny Cohen, who was so informed by James Liberto, who was so informed by Joe Liberto or by some other source, whose identity was not revealed to Cohen or in the record. Absent this testimony by Manley about Cohen's statements from others about Luskin being involved, there was not sufficient evidence to convict Luskin. The reason these remote out-of-court statements were heard and considered by a jury in determining Paul Luskin's fate, is because the indictment was brought within the Fourth Circuit, after June 23, 1987, the date this Court decided *Bourjaily* v. *United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). The reason why the Court of Appeals upheld their admissibility is because it misapprehended the record, and because its standards for admissibility differ from the more appropriate approach of the Ninth Circuit Court of Appeals.

In *Bourjaily* v. *United States*, this Court reviewed the law with respect to the admission of co-conspirator statements under Rule 801(d)(2)(E), and held that before an out-of-court statement may be admitted pursuant to this rule, the party offering the evidence must establish by a

preponderance of the evidence that (1) a conspiracy existed, (2) both the declarant and the non-offering party were members of the conspiracy, and (3) the statement was made in the course of and in furtherance of the conspiracy. *Id.*, 483 U.S. at 175. Moreover, this Court held that under Rule 104(a), Federal Rules of Evidence, district courts may consider the contested hearsay statements, themselves, along with all other evidence, in determining whether the government has shown by a preponderance of the evidence that the defendant had knowledge of and participated in the conspiracy. *Id.*, 483 U.S. at 178. In reaching this conclusion, this Court explained:

> [t]o the extent that [the prohibition against bootstrapping set fourth in *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.680 (1942)] meant that courts could not look to the hearsay statements themselves for any purpose, it has clearly been superceded by Rule 104(a). *Id.*, 483 U.S. at 181.

*See also, United States* v. *Silverman*, 861 F.2d at 577.

Explicitly left open by this Court in *Bourjaily*, is the question whether courts can rely solely upon a co-conspirator's hearsay statements to determine that a conspiracy had been established, and that a defendant is a participant in it. *Id.*, 482 U.S. at 181; see *Id.*, 483 U.S. at 198 (Blackmun, J., joined by Brennan and Marshall, J.J., dissenting) ("It is at least heartening . . . to see that the Court reserves the question whether a co-conspirator's statement alone, without any independent evidence, could establish the existence of a conspiracy and a defendant's participation in it.") No court since *Bourjaily* has ruled that a co-conspirator's statement can bootstrap itself into admissibility. *See United States* v. *Gordon*, 844 F.2d 1397 (9th Cir. 1988) (when the proponent of the co-

conspirator's statement offers no additional proof of defendant's knowledge of and participation in the conspiracy, the statement must be excluded); *United States* v. *Leavis*, 853 F.2d 215, 219 (4th Cir. 1988) (declining to decide issue); *United States* v. *Shoffner*, 826 F.2d 619, 627 n.12 (7th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 356 (1987) (same); *United States* v. *Dworken*, 855 F.2d 12, 25 (1st Cir. 1988) (same); *United States* v. *Chestang*, 849 F.2d 528, 531 (11th Cir. 1988) (same). In fact, at least one State, Florida, has expressly declined to follow *Bourjaily* as a matter of state law. *See Romani* v. *State*, 542 So.2d 984, 986 (Fla. 1989) ("we are apprehensive that adopting the *Bourjaily* rule would frequently lead to the admission of statements which are not reliable.").

Assuming *arguendo* that some evidence independent of the co-conspirator statement is needed, *Bourjaily* also does not address whether wholly innocent conduct by a defendant, in conjunction with the out-of-court statement by an alleged co-conspirator, would be sufficient to establish by a preponderance of the evidence, a defendant's participation in a conspiracy, thereby rendering the co-conspirator's statement admissible.

In *United States* v. *Silverman*, *supra*, the Ninth Circuit analyzed this latter issue not addressed by *Bourjaily*, and concluded that:

> [e]vidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative of the co-conspirator's statement to constitute proof, by a preponderance of the evidence, that the defendant knew of and participated in the conspiracy.

*Id.*, 861 F.2d at 578. Accordingly, the Ninth Circuit requires that the corroborative evidence considered by a court in conjunction with a co-conspirator's statement be

incriminating evidence in order for it to establish, by a preponderance of the evidence, a defendant's connection to a conspiracy. *Id.*, 861 F.2d at 578.

The Ninth Circuit's analysis is premised upon the understanding that as a general rule, "out-of-court statements are presumptively unreliable, [and] when the out-of-court statement is one made by a co-conspirator purporting to implicate others in an unlawful conspiracy, its reliability is doubly suspect." *Id.*, 861 F.2d at 578. In support of this proposition, the Court of Appeals cites to both the majority opinion and dissent in *Bourjaily*, 483 U.S. at 181, 198 (Blackmun, J., joined by Brennan and Marshall, J.J., dissenting); *Wong Sun* v. *United States*, 371 U.S. 471, 490 n. 17 (1963) (quoting Williams, The Proof of Guilt 135 (1958)), and other learned articles. *Cf. Bruton* v. *United States*, 391 U.S. 123, 141-42 (1968) (co-defendant statements are "intrinsically much less reliable" than other forms of hearsay and have been traditionally viewed with special suspicion (White, J., dissenting)). Indeed, in the case *sub judice*, the co-conspirator statements in question are far greater than "doubly suspect" since the declarant does not claim to have personal knowledge of the recited facts, and the ultimate source for the third—or fourth level hearsay is unknown. This case involves substantially unreliable out-of-court statements of the most damaging nature.

Accordingly, while Rule 104(a) may permit a court to consider a co-conspirator's statement in combination with other evidence in determining whether a preliminary showing has been made by the preponderance of the evidence, as the Ninth Circuit correctly points out, "Rule 104(a) does not diminish the inherent unreliability of such [out-of-court] statements." *United States* v. *Silverman*, 861 F.2d at 578. Similarly, consideration of such state-

ments in conjunction with wholly innocent and innocuous conduct does little to neutralize its inherent unreliability.

> Evidence of innocent conduct does little, if anything, to enhance the reliability of the co-conspirator's statement. A co-conspirator's statement, which is presumptively unreliable hence inadmissible standing alone, is no more reliable when coupled with evidence of conduct that is completely consistent with defendant's unawareness of the conspiracy.

*Id.*, 861 F.2d at 578. When the out-of-court co-conspirator statement is of a third—or fourth-level nature, innocent independent evidence can not serve to sufficiently corroborate the statement to permit its admissibility.

Yet, the only evidence relied upon by the Court of Appeals and the trial court that has support in the record in the present case, is innocent and innocuous pieces of circumstantial evidence. The most damaging piece of such evidence relied upon by the Fourth Circuit, the March 9 phone call from Paul Luskin to Pellucci's Restaurant, and the phone call earlier that day from Pellucci's Restaurant to Paul Luskin's home in Baltimore, never occurred, and can not be found in the record.

All of the independent evidence relied upon below is circumstantial, speculative, and most important, innocent conduct. Much of it requires not only one inference to believe it was related to Paul Luskin belonging to a conspiracy to murder his wife, but rather, it requires that an additional inference be piled upon the initial inference. This type of evaluation of circumstantial evidence was condemned by this Court long ago because it leads to an unreliable conclusion. *See United States* v. *Ross*, 92 U.S. 281 (1876) (piling inference upon inference is a "mode of arriving at a conclusion of fact [that] is generally, if not universally, inadmissible . . . [because] no inference of

fact or of law is reliable, drawn from premises which are uncertain"). *See also United States* v. *Williams - Hendricks*, 805 F.2d 496, 502 (5th Cir. 1986) (government must do more than "pile inference upon inference" upon which to base a charge of conspiracy.)

For all the time spent discussing telephone toll records, there is not a single incriminating call involving Paul Luskin as a conversant. Other than the non-existent phone calls cited by the Fourth Circuit, there are no calls tending to corroborate any participation by Luskin in the conspiracy. The toll records certainly do not indicate the substance of any of the conversations. They do not even indicate the identity of the conversants. In many cases, the calls were to or from business establishments where multiple individuals had access. In the context of Paul Luskin, all that the telephone records show is that before, during and after the time period of the conspiracy alleged, Luskin called his family business in Florida where many, many persons worked, including Joseph Liberto. Without more, and without identification of the conversants, it is pure speculation that the calls involved a member or members of the conspiracy, or that it had some connection to said conspiracy. The mere existence of such calls are wholly innocent and innocuous. *See United States* v. *Solis*, 612 F.2d 930 (5th Cir. 1980) (in the absence of evidence as to who made or received the phone calls, insufficient showing was made that defendant belonged to conspiracy); *United States* v. *Lococo*, 450 F.2d 1196, 1200 (9th Cir.), *cert. denied*, 406 U.S. 945 (1971) (absence of proof of who made calls or caused calls to be made, rendered telephone toll records inadmissible).

At worst, the telephone toll records may support an inference of mere association of Paul Luskin to a member of the conspiracy. Such association does not corroborate

or tend to establish that Luskin was involved in the conspiracy. As noted by the Court of Appeals for the Eighth Circuit, "[i]n the context of Rule 801(d)(2)(E), the government must show the likelihood of illicit association between the declarant and the defendant." *United States* v. *Whalen*, 844 F.2d 529, 533 (8th Cir. 1988), *citing*, *United States* v. *Zamarripa*, 544 F.2d 978, 982 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1987). Here, as in *Whalen*, there is no evidence of an illicit association, and certainly, the phone records do not tend to establish such an association.

Furthermore, the mere existence of these telephone calls do not independently corroborate other incriminating testimony at Luskin's trial that such a call took place in furtherance of the conspiracy. *See United States* v. *Zavola-Serra*, 853 F.2d 1512 (9th Cir. 1988). Thus, this is not a case where such telephone records have any evidentiary value independently, or as corroboration, in proving defendant's participation in a conspiracy. Concomitantly, the telephone records have little value, if any, in determining whether the required preliminary showing was made by the government, by a preponderance of the evidence.

Similarly, the evidence introduced by the Government to show that Luskin visited the Baltimore-Washington metropolitan area on several occasions in 1987, corroborates nothing germane to a conclusion that he was a member of a conspiracy to murder his wife. Besides the fact that a number of witnesses for both the defense and the Government explained Luskin's legitimate presence in the area, no evidence was adduced showing any contact between Luskin and any of his co-defendants during those time periods. It requires pure speculation to convert these innocent visits to independent corroborative evi-

dence of Luskin's involvement in a conspiracy. See *United States* v. *Whalen*, 844 F.2d at 534 (such speculation does not show a conspiracy).

Finally, the evidence relied upon by the Fourth Circuit that Paul Luskin may have been told by his then-girlfriend that Marie Luskin would be at Bennigan's Restaurant on July 28 is non-incriminating by itself. No evidence was introduced connecting Cohen to Luskin, or that Luskin did pass this information to Cohen directly, or indirectly. Absent wild speculation, this fact does not corroborate that Luskin was a member of a conspiracy to murder his wife.

The circumstantial evidence presented in this case is similar to that presented in *Silverman*, "completely consistent with a conclusion that [the defendant] was unaware of the conspiracy," and insufficiently corroborative of the co-conspirator's out-of-court statements to overcome the presumption of unreliability. *United States* v. *Silverman*, 861 F.2d at 579. In *Silverman*, the defendant actually drove his sister to an airport to meet her co-conspirators while she was in possession of cocaine. It was also shown that during one of her cocaine-buying expeditions, his sister came to visit his home. Those facts at least placed Silverman with the co-conspirators while the conspiracy was in progress, and showed that he might have participated by delivering his sister, who had the drugs, to the airport. Yet, the Ninth Circuit found these facts "only marginally probative of *Silverman's* involvement because it merely showed an association with a member of a conspiracy without demonstrating any connection to the conspiracy." *Id.*, 861 F.2d at 579. At worst, that is all the evidence shows in Luskin's case. None of the independent corroborative

evidence in Luskin's case was the incriminating type of evidence required by *Silverman*.

The type of incriminating corroborating evidence required by the Ninth Circuit, as pointed out by the court in *Silverman*, can be found in the *Bourjaily* decision itself. *Id.*, 861 F.2d at 578. In *Bourjaily*, the corroborative evidence relied upon by this Court included a criminal act by the defendant which furthered the conspiracy described in the co-conspirator's statement. There, the defendant actually accepted the cocaine when it was produced by the co-conspirator, as described in the co-conspirator statement in question. Other examples of incriminating corroborative evidence are cited in *Silverman*. *See e.g.*, *United States* v. *Crespo de Llano*, 830 F.2d 1532, 1543, *aff'd*, 838 F.2d 1006, 1016-17 (9th Cir. 1987) (defendant present during negotiations and obtained sample for government undercover agent to taste, and translated price of cocaine); *United States* v. *Paris*, 827 F.2d 395, 400 (9th Cir. 1987) (defendant in possession of cocaine at prearranged time and location for transaction); *United States* v. *Stewart*, 770 F.2d 825, 831 (9th Cir. 1985) *cert. denied*, 474 U.S. 1103 (1986) (defendant present at seller's house immediately before each of three drug transactions, seller and defendant met immediately after two of the transactions, and defendant's palm print was found on envelope that contained drug); *United States* v. *Mason*, 658 F.2d 1263, 1269 (9th Cir. 1981) (defendant was only person to visit seller between time seller telephoned his source to obtain contraband and time seller provided contraband to government agents). Numerous other cases have found such incriminating evidence to exist to corroborate the co-conspirator statement in question. *See e.g. United States* v. *Valverde*, 846 F.2d 513, 516 (8th Cir. 1988) (admission by defendant linking defendant to the

conspiracy supported court's preliminary finding); *United States* v. *Chestang*, 849 F.2d 528, 530 (11th Cir. 1988) (government showed that defendant met with co-conspirators and had performed acts in furtherance of the conspiracy); *United States* v. *Leavis*, 853 F.2d 215, 220 (4th Cir. 1988) (defendant met with co-conspirators during acts in furtherance of conspiracy, defendant wrote extensive list of questions to determine how to avoid radar detection and found in possession of unauthorized fuel bladder used to increase airplane fuel range); *United States* v. *Martin*, 866 F.2d 972, 980 (8th Cir. 1989) (independent identification of both defendants as persons casing the store, and defendants' possession of burglary tools corroborated co-conspirator statements); *United States* v. *de Ortiz*, 883 F.2d 515, 521 (7th Cir. 1989) (defendant's admission plus her extensive travel with co-conspirators during conspiracy and her participation in conversations during which drug transactions were discussed).

Without the statements of Cohen through Manley's testimony, the Government did not meet its burden of proving Luskin guilty beyond a reasonable doubt. Thus, the admission of the inadmissible statements was prejudicial. *See United States* v. *Silverman*, 861 F.2d at 580; *United States* v. *Stroupe*, 538 F.2d 1063, 1066 (4th Cir. 1978) (absent co-conspirator's inadmissible hearsay, evidence was so "tenuous" and "speculative" that it left the court "with no more than a suspicion of guilt"); *United States* v. *Zule*, 581 F.2d 1218, 1220 (5th Cir. 1978) ("the conspiracy conviction must necessarily fall because . . . the government's evidence of conspiracy did not even meet the weaker standard necessary to support admission of a co-conspirator's statement.")

The innocent and innocuous evidence presented in this case to corroborate the third-or fourth-level out-of-court

statements by an alleged co-conspirator to show by a preponderance of the evidence that Luskin had knowledge of and participated in a conspiracy to murder his wife, is the precise type of evidence deemed insufficient as a matter of law for such a showing by the Ninth Circuit Court of Appeals. Accordingly, a conflict now exists on an important question of law in the Court of Appeals.

## CONCLUSION

This Court should grant this Petition to settle an important question of federal law which has not been settled by this Court, which would resolve a conflict now existing in the Courts of Appeal.

Respectfully submitted,

MICHAEL S. LIEBERMAN
*Counsel of Record*
DIMURO, GINSBERG AND LIEBERMAN, P.C.
1001 Duke Street
Alexandria, Virginia 22314
(703) 684-4333

BENJAMIN F.L. DARDEN, ESQUIRE
LAW OFFICES OF MORRIE I. LEVINE
Suite 316
780 N.E. 69th Street
Miami, Florida 33138
(305) 758-4703
*Counsel for Petitioner*

# APPENDIX

## APPENDIX

# Supreme Court Of The United States

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**No. A-440**

---

PAUL LUSKIN,

*Petitioner*

v.

UNITED STATES

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## ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 17, 1990.

/s/ WILLIAM H. REHNQUIST
Chief Justice of the United States

Dated this 11th
day of December, 1989.

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

---

**No. 88-5068**

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

PAUL LUSKIN,
*Defendant-Appellant.*

---

**On Petition For Rehearing With Suggestion For Rehearing In Banc**

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that petition for rehearing and suggestion for rehearing in banc are denied,

Entered at the direction of Judge Russell with the concurrence of Judge Murnaghan and Judge Staker (U.S. District Judge).

For the Court,
JOHN M. GREACEN
Clerk

Filed: October 19, 1989
U.S. Court of Appeals
Fourth Circuit

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**No. 88-5068**

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UNITED STATES OF AMERICA
*Plaintiff-Appellee,*

v.

PAUL LUSKIN
*Defendant-Appellant.*

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**No. 88-5069**

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UNITED STATES OF AMERICA
*Plaintiff-Appellee,*

v.

MILTON BACHMAN COHEN, a/k/a Sonny Cohen
*Defendant-Appellant.*

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**No. 88-5072**

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UNITED STATES OF AMERICA
*Plaintiff-Appellee,*

v.

JAMES J. LIBERTO
*Defendant-Appellant.*

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**No. 88-5074**

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UNITED STATES OF AMERICA
*Plaintiff-Appellee,*

v.

JOSEPH LIBERTO
*Defendant-Appellant.*

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (Cr-87-478-JFM)

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Argued: March 8, 1989 Decided: September 19, 1989

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Before RUSSELL and MURNAGHAN, Circuit Judges, and STAKER, United States District Judge for the Southern District of West Virginia, sitting by designation.

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Andrew Graham (James Patrick Ulwick, Kevin F. Arthur, KRAMON & GRAHAM, P.A. on brief); Howard L. Cardin (CARDIN & GITOMER, P.A. on brief); Paul Weiss; Michael Stuart Libowitz (MOORE, LIBOWITZ & THOMAS on brief) for Appellants. Gregg Lewis Bernstein, Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney on brief) for Appellee.

**PER CURIAM:**

In this case, a routine drug courier profile stop by the Baltimore City Police led to the discovery of a murder for hire scheme involving each of the named appellants (Paul Luskin, James Liberto, Joseph Liberto and Milton "Sonny" Cohen), all of whom were convicted by a jury of conspiracy to commit

murder and various related weapons charges. These convictions stemmed from a plot to kill Luskin's wife.

Prior to trial, each of the appellants filed motions for severance asserting the potential for prejudice from antagonistic defenses. Luskin, in particular, sought severance on the basis that evidence admissible only against the other defendants might be improperly used against him. Cohen also filed a motion to suppress evidence seized at the time of this arrest. The district court denied all motions for severance as well as the motion to suppress. After a four-week trial, the jury returned verdicts of guilty on all counts against each appellant. Lengthy jail sentences were imposed and a timely appeal was noted by each appellant. As we find no error on record to support a reversal of these convictions, we affirm.

I.

On July 30, 1987, Sonny Cohen and James Manley were arrested at the train station in Baltimore, Maryland. Authorities in Baltimore had been alerted by AMTRAK security officials in Florida that the two men fit the drug courier profile. Specifically, Baltimore officials were advised that Cohen and Manley had purchased round-trip first class tickets with cash, stayed in Florida less than one day prior to returning to Baltimore on a 24-hour train ride, and that Cohen had left a call-back number for his train reservation to an inoperative number.

Upon exiting the train, the two men were stopped by Baltimore City Police Detective McVicker and AMTRAK security guards and asked to produce identification. Manley was unable to do so and appeared visibly nervous. In fact, Detective McVicker testified that Manley was shaking and "seemed to be petrified." Suspicions aroused, Officer McVicker and the AMTRAK security guards escorted the two men to an interview room to subject their luggage to a dog sniff. The dogs reacted positively. The officers then obtained a search warrant, searched the luggage and found a loaded AR-15 rifle with a

laser scope in Manley's luggage. In the bag carried by Cohen, two loaded pistols, a silencer and 3½ ounces of cocaine were found. Both men were then arrested.

Manley enter into a post-arrest plea agreement with the Government and upon his testimony the following facts were extracted: Paul Luskin was involved in a long and bitter divorce proceeding with his wife Marie. At stake was the bulk of Luskin's assets including a successful Florida business. Rather than proceed with the divorce and risk losing such assets, Luskin resolved to have his wife killed. To such an end, Luskin contacted long-time associate Joe Liberto and advised him of his plan. Joe then contacted his brother Jimmy, also a business associate of Luskin, who in turn commissioned Sonny Cohen to kill Marie Luskin in Florida. Such services were to cost Paul Luskin $50,000.

Cohen traveled to Florida to carry out the plan. On March 9, 1987, posing as a floral delivery man, Cohen gained entry to Marie Luskin's home and shot her in the head. She survived the wound. Fearing erroneously that during his failed attempt to kill her, Marie Luskin saw his face, Cohen recruited Manley to aid him in completing the murder contract. In May of 1987, the two traveled to Florida together, devised an elaborate scheme to finish their job, but ultimately failed.

Prior to the third and final attempt to kill Mrs. Luskin, Cohen told Manley that there would be a $25,000 bonus if the job were completed on July 28. Apparently, divorce proceedings between the Luskins were soon to begin and Paul Luskin wished to have the matter attended to prior to that time. However, this final attempt on Marie Luskin's life also resulted in failure, and upon return to Baltimore, the two were arrested.

Manley's testimony was corroborated by the Government's proffer of various telephone bills, hotel registration forms and credit card receipts. At trial, all appellants denied participation in this murder for hire scheme. Luskin asserted that Cohen and the Liberto brothers were involved in a large scale

drug distribution operation in which he had no part. Jimmy Liberto asserted that evidence offered by the Government against him that he often traveled to Florida and owned the gun found in Manley's luggage showed little more than legitimate business travel and a desire for self protection. Joe Liberto asserted that any evidence against him showed only legal activity. Finally, Sonny Cohen asserted that because no one could positively identify him as Marie Luskin's assailant on March 9, there was insufficient evidence to support his conviction.

II.

Each appellant claims error in the trial court's denial of his motion for severance on the ground of antagonistic defenses. Fed.R.Civ.P. 8 permits joinder of defendants in one indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Under this rule, the appellants here were properly named in one indictment as they were all charged with conspiracy to murder Luskin's wife.

Ordinarily, persons joined in an indictment are to be tried together. *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983). This is especially true where the indictment charges a conspiracy, or a crime having a principal and aider-abetters. *United States* v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986); *United States* v. *Kuhn*, 381 F.2d 824, 838 (7th Cir.); *cert. denied*, 389 U.S. 1015 (1967). However, "[i]f it appears that a defendant . . . is prejudiced by a joinder of defendants in an indictment or for trial together, the [district] court *may* grant a severance of defendants or provide whatever relief justice requires." Fed.R.Crim.P. 14 (emphasis added). "[T]he mere presence of hostility among defendants, . . . or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials . . ." *United States* v. *Ehrlichman*, 546 F.2d 910, 929 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977), *quoting United States* v. *Barker*, 442 F.2d 517, 530 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). Therefore,

"[a]ntagonistic defenses do not per se require severance even if the defendants . . . attempt to cast blame on each other." *United States* v. *Spitler*, *supra*, at 1271, *quoting United States* v. *Becker*, 585 F.2d 703, 707 (4th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979).

Case law makes it readily apparent that motions for severance are rarely granted. *United States* v. *Keck*, 773 F.2d 759 (7th Cir. 1985). A defendant must show more than merely that a separate trial would offer him a better chance of acquittal." *United States* v. *Parodi*, *supra*, at 780. Further, "[t]he decision to deny severance, which is within the sound discretion of the district judge, will not be overturned unless the defendant affirmatively demonstrates a clear abuse of discretion through having been deprived of a fair trial and having suffered a miscarriage of justice." *United States* v. *Spitler*, *supra*, at 1271-1272. *See also Person* v. *Miller*, 854 F.2d 656, 665 (4th Cir. 1989), *cert denied*, 104 S.Ct. 1119 (1989). Where severance is sought "on the ground of conflicting defenses [,] it must be demonstrated that the conflict is so prejudicial that the differences are irreconcilable, and that the jury will unjustifiably infer that this conflict *alone* demonstrated that [all] are guilty." *Becker*, *supra* at 707, *quoting Ehrlichman*, 546 F.2d at 929 and *United States* v. *Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). In this case, none of the appellants has made the requisite showing of abuse of discretion by the district court. Each appellant was able to put forth his theory of the case and present evidence to support such a theory. When necessary, limiting instructions were rendered by the district judge to limit any potential prejudice inherent in witness testimony. Such cautionary instructions cleared the way for the jury to make individual guilt determinations. *United States* v. *Parker*, 821 F.2d 968, 972 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988). Had the jury believed the evidence proffered by the appellants, verdicts of acquittal would certainly have been rendered. However, in the light of overwhelming evidence against each appellant, the jury was certainly well within this province to convict each appellant on all counts. Nowhere has it

been demonstrated that the antagonistic defenses alone resulted in conviction.

Further, Luskin's contention that his case should have been severed because of the prejudicial effect of "spillover" evidence must also fail. *See United States* v. *Lawson*, 780 F.2d 535 (6th Cir. 1985) (per curiam). Here, Luskin was named in each count of the indictment and was in fact the driving force behind this entire scheme. Any evidence as to the activity of other defendants merely points to the extent of the criminal activity in pursuing this criminal plan. Such evidence was essential to the prosecution and was properly admitted.

II.

Appellant Cohen contends that the trial court committed reversible error in denying his motion to suppress the evidence seized at the Baltimore Train Station (two loaded pistols, a silencer, and 3½ ounces of cocaine). This contention, too, is without merit.

Not all police-citizen contact invokes the Fourth Amendment. *Terry* v. *Ohio*, 392 U.S. 1 (1968). There are three levels of police-citizen encounters: (1) communication between police or citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment; and (2) so-called *Terry* stops or brief "seizures" that must be supported by reasonable suspicion; and (3) full scale arrests that must be supported by probable cause. *United States* v. *Galberth*, 846 F.2d 983 (5th Cir.), *cert. denied*, 109 S.Ct. 167 (1988), *quoting United States* v. *Berry*, 670 F.2d 583, 591 (5th Cir. 1982). Here, we believe that the officers in this case acted within the bounds of the law at each level of their encounter with Cohen and properly seized both the weapon and the cocaine from him.

At the first level, there is no element of detention or coercion, and the Fourth Amendment is not implicated. *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (mere approach by law enforcement agents, identifying themselves as such, does not constitute a seizure). The second level involves brief detentions

and requires "reasonable suspicion" on the part of the law enforcement official based upon "specific and articulable fact which, taken together with rational inferences from these facts, reasonably warrants an intrusion." *Terry* v. *Ohio*, *supra*, at 19. The third level, arrest, requires the existence of probable cause. *New York* v. *P.J. Video*, 475 U.S. 868 (1986). Here, the totality of the circumstances shows that the officers acted within the bounds of the established law when questioning, searching and ultimately arresting Cohen at the Baltimore Train Station at each level of police-citizen contact. The first level was the officers' approach of Cohen and Manley. The second level was the officers' detention of the two to subject their bags to a dog sniff. The principal issue here is whether or not the officers were armed with the requisite quantum of reasonable suspicion that Cohen's luggage contained contraband to justify the dog sniff. Here, the officers had been alerted that Cohen and his traveling companion fit the "drug courier profile." Each elected to return from Florida by train, a 24-hour ride, after staying in Florida (a known drug distribution center) for less than one day. Finally, Manley was recognizably nervous when he spoke to the Baltimore officers. *See e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

> When an officer's observation lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny permits the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

*United States* v. *Place*, 462 U.S. 696, 706 (1983).

Here, the detention to subject the bags to a dog sniff was sufficiently limited in scope under *Terry* and did not violate Cohen's Fourth Amendment rights. *See, e.g.*, *United States* v. *Whitehead*, 849 (4th Cir.), *cert. denied*, ____ U.S. ____ (1988).

Once the dogs reacted positively, the detectives were armed with the requisite probable cause and were justified in detaining the two until a search warrant could be executed legitimizing the third level of this police citizen encounter. *Michigan* v.

*Summers*, 452 U.S. 692 (1981); *United States* v. *Whitehead*, *supra*, at 853. Accordingly, the evidence was both properly seized and admitted at trial.

III.

Finally, Appellant Luskin contends that the Government failed to adduce substantial independent evidence of a conspiracy of which Luskin was a member, rendering the trial court's admission of co-conspirator declarations under Fed.R.Evid. 801(d)(2)(E) error. Specifically, Luskin objects to the court's admission of testimony of Sonny Cohen that directly linked Luskin to this murder for hire scheme.

Fed. R.Evid. 801(d)(2)(E) allows for the admission of statements made by a co-conspirator if made during the course and in furtherance of the conspiracy, as an exception to the rule against hearsay.

However, before a court can admit a co-conspirator's statement the district court must be satisfied that the statement actually falls within the definition of the rule. There must be evidence that there was a conspiracy involving the declarant and the non-offering party and that the statement was made in furtherance of the conspiracy. Existence of the conspiracy and the defendant's involvement in it are preliminary questions of fact which must be resolved by the district court before any statement under the co-conspirator exception is to be admitted. Fed.R. Evid. 104. *See Bourjaily* v. *United States*, 107 S.Ct. 2775 (1987).

In making a preliminary factual determination as to the existence of a conspiracy, the court may examine the hearsay statements sought to be admitted. *Bourjaily*, 107 S.Ct. 2781-2782. *See also Glasser* v. *United States*, 315 U.S. 60 (1942). This is true because the co-conspirator exception to the rule against hearsay is so firmly rooted in the jurisprudence that the court need not independently inquire into the reliability of such statements. *Bourjaily*, at 2783. If by a preponderance of the evidence a conspiracy is found to exist,

statements by co-conspirators are admissible. *Id.* "The preponderance standard ensures that before admitting evidence, the court will have found it i[s] more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." *Id.* at 2779.

In this case, the Government introduced a plethora of evidence to show both that a conspiracy existed and that Paul Luskin was an active participant in it. The Government concedes that much of this evidence was circumstantial, but, as we recently held in *United States* v. *Jackson*, 863 F.2d 116, 1173 (4th Cir. 1989), such evidence is of equal probative value as direct evidence. That evidence is:

(1) Cohen knew prior to his second attempt to kill Marie Luskin that she would be at Bennigan's Restaurant in Hollywood, Florida on July 29, 1987 at a specific time. Marie Luskin was to be at such location to host a dinner meeting for a recently formed single parents support group. Also in attendance at such meeting was Susan Davis, the then-girlfriend of Paul Luskin. At trial, Ms. Davis testified that upon receipt of the invitation to such meeting, she informed Paul Luskin about it and indicated that his wife would be in attendance. Considering the fact that both Liberto and Cohen are Baltimore residents, it is a reasonable inference that they gained the information about Ms. Luskin's movements from Paul Luskin.

(2) The first attempt of Mrs. Luskin's life occurred about 10:00 a.m. on March 9, 1987. Within the hour, a telephone call was forwarded from the Marco Polo Hotel, where Sonny Cohen was a registered guest, to Pellucci's Restaurant in Baltimore, owned and operated by Jimmy Liberto. Five minutes later there was a call from Pellucci's to Joe Liberto's home in Florida. One minute after that call ended, there was a call from Pellucci's to Paul Luskin's home in Baltimore. Shortly thereafter, Luskin placed a call from his car telephone to his home in Florida where his wife's aunt answered the phone. Although Marie Luskin had at this time already been shot, the aunt who

answered the telephone did not so inform him. Luskin then immediately placed a call to Pellucci's Restaurant. Again, the reasonable inference to be drawn from this evidence when coupled with events of the day is that Luskin was in fact involved in the conspiracy.

These are only two examples of evidence introduced by the Government upon which the district court made preliminary determination as to the existence of a conspiracy for the purpose of rendering admissible a co-conspirator's statements. We are satisfied that the Government did show, as they must, by a preponderance of the evidence, that a conspiracy existed. Accordingly, the testimony of Sonny Cohen was therefore properly admitted at trial by the district court. *See Bourjaily v. United States, supra.*

IV.

We can quickly dispose of Luskin's final two arguments raised here on appeal. First, Luskin contends that the Government failed to introduce any evidence that he was an aider or abettor in causing a firearm to be carried during the commission of a crime of violence. As such, according to Luskin, his conviction under 18 U.S.C. § 924(c), which renders criminal the carrying of a firearm during the commission of a violent crime, must fall. Specifically, Luskin argues that because the Government failed to prove that Luskin knew that firearms were to be carried and used by those he hired to kill his wife, his conviction was improper.

In charging the jury, the district judge explained:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.
>
> In order to aid and abet another to commit a crime, it is necessary that the defendant willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about, that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

Essentially, Luskin's argument is that such an instruction is an improper extension of the *Pinkerton* doctrine, so named for the holding in *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Such doctrine holds that each conspirator may be liable for the overt acts of every other conspirator done in furtherance of the conspiracy.

Section 924(c) had been held to apply even if a conspirator had no knowledge that another conspirator was in possession of a gun. *See United States* v. *Brant*, 448 F.Supp. 781, 782 (W.D. Pa. 1978); *United States* v. *Gironda*, 758 F.2d 1201 (7th Cir.), *cert. denied*, 474 U.S. 1004 (1985).

In this case, there was ample evidence that those hired by Luskin carried guns in furtherance of their objective in this conspiracy and that it was Luskin's desire that such objective be carried out. Accordingly, Luskin was properly convicted under 18 U.S.C. § 924 (c) here.

Finally, Luskin argues that he is entitled to a reversal due to the Government's improper use of derogatory comments about Luskin's character during rebuttal closing argument. Luskin contends that the following colloquy so prejudiced him that he was denied his right to a fair trial:

> GOVERNMENT COUNSEL: Ladies and gentlemen, this case is about greed, its about arrogance, its about violence. Mr. Allen [defense counsel] claims that Paul Luskin would not plot to murder his wife and the family. Paul Luskin has lived his life, ladies and gentlemen, without regard to others, without regard—
>
> DEFENSE COUNSEL: Objection. There is no evidence of that.
>
> THE COURT: Just strike that go ahead, Mr. Stollers.
>
> DEFENSE COUNSEL: I ask that it be stricken.
>
> THE COURT: I just struck it, Mr. Allen.

We review the entirety of the prosecutor's remarks under the Fed.R.Crim.P. 52 (a) harmless error rule to determine

"whether it is more probable than not that the improper remarks materially affected the verdict." *United States* v. *Prantil*, 764 F.2d 548, 556 (9th Cir. 1985). Upon review, we are satisfied that such a statement, properly struck by the district court, was not so egregious as to deny the appellant a fair trial. *See, United States* v. *Weatherless*, 734 F.2d 179, 182 (4th Cir.), *cert. denied*, 469 U.S. 1088 (1984); *United States* v. *Karas*, 624 F.2d 500, 506 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

In light of the overwhelming evidence against the appellant, we find this isolated incident had no prejudicial effect upon the outcome of this trial.

Having reviewed all the claims of error and found them without merit, the judgments of conviction herein are

*AFFIRMED.*